

No. 15952

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

MOSS AMBER MFG. CO.,

Respondent.

On Petition for Enforcement of an Order of the
National Labor Relations Board.

RESPONDENT'S BRIEF.

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Statement of the Case.

The Statement of the Case contained in the Board's Brief fails to set forth two facts which Respondent regards as important.

(1) In making its determination of the appropriate bargaining unit in the representation case the Board did not consider as a factor the extent of organization among the employees of Respondent at the San Fernando plant. [R. 6-12.]

(2) At the hearing before the Trial Examiner in the unfair labor practice case, Respondent did urge that the evidence regarding efforts of the Union to organize all production employees, not only cutters, at the Los Angeles

and San Fernando plants, both before and after the filing of the petition and the hearing in the representation case was “newly discovered” and was not available to Respondent at the time of the representation hearing. [R. 100, 102.] The Trial Examiner made no specific ruling upon the fact that the evidence was “newly discovered,” nor did he inquire as to why the Respondent did not discover such evidence before the representation hearing. He merely rejected all evidence proffered upon the ground “that these were all matters which were litigated or could have been litigated, or should have been litigated in the representation proceeding.” [R. 103.] In its exception to the report of the Trial Examiner filed with the Board, Respondent urged that it was error for the Trial Examiner to exclude this “newly discovered” evidence. [R. 45-50.]

The Evidence Excluded and the Grounds for Such Exclusion.

On September 5, 1956 the Union filed its petition with the Board seeking certification of the cutters employed at Respondent's San Fernando plant. [R. 3-5.] There were three cutters so employed—all males. [R. 85.] There were approximately 100 other production employees at the same plant, most of whom were females. [R. 69, 74, 76.]

The Respondent offered evidence that in August, 1956 [R. 99; Resp. Ex. 3 *id.*] before it filed its petition for 3 employees, the Union was attempting to organize all production employees at the San Fernando plant [R. 99]; that all such employees were eligible for membership in the Union [R. 95, 98], and that this evidence was not available nor known to the Respondent at the time of the hearing on the representation matter. [R. 100, 102.]

Counsel for the General Counsel objected to the receipt of such evidence upon the grounds that it related to matters which either were or could have been presented in the representation case, and further that such evidence was irrelevant, immaterial and would not tend to prove any of the issues. [R. 102-103.] The Trial Examiner sustained the objection to the receipt of such evidence upon the ground that "these were all matters which were litigated or could have been litigated, or should have been litigated in the representation proceeding."

ARGUMENT.

The Limitations on the Board's Discretion in Determining the Appropriate Unit.

The Union is entitled under the Act to bargaining rights only when it has demonstrated that it represents a majority of the employees in an appropriate bargaining unit. To apply that principle to the facts of this case—if the appropriate unit in this case consists only of cutters, then the Union has only to demonstrate that it represents 2 employees, whereas if the appropriate unit is found to be all production employees, the Union must demonstrate that it represents 51 employees in order to be entitled to bargaining rights. Thus, it is clear that in any claimed refusal to bargain under the Act, the determination of the appropriate bargaining unit is of paramount importance.

The National Labor Relations Board is the agency designated to determine the appropriate bargaining unit. Prior to 1947 the Board enjoyed practically unlimited discretion in determining what constitutes an appropriate unit. In some cases the determination was based upon the extent to which the employees had organized, the

result being that the union involved became entitled to bargaining rights for a small part of the employees, or for a department of a plant, instead of the entire plant. This Congress found to be undesirable. In 1947 it placed a limitation upon the discretion of the Board in this regard, amended the Act by adding Section 9(c)(5) (set out in Appendix to Board's Br. p. 16) which specifies that the extent to which the employees have organized shall not be controlling in the determination of the appropriate unit. The reasons advanced by the House of Representatives for adopting the amendment are as follows:

“Section 9(f)(3)¹ strikes at a practice of the Board by which it has set up as units appropriate for bargaining whatever group or groups the petitioning union has organized at the time. Sometimes, but not always, the Board pretends to find reasons other than the extent to which the employees have organized as ground for holding such units to be appropriate (*Matter of New England Spun Silk Co.*, 11 N. L. R. B. 852 (1939); *Matter of Botany Worsted Mills*, 27 N. L. R. B. 687 (1940). While the Board may take into consideration the extent to which employees have organized, this evidence should have little weight, and, as section 9 (f)(3) provides, is not to be controlling.

“The act still leaves the new Board wide discretion in setting up bargaining units.” (House Report, 245, 80th Cong., pp. 37-38.)

¹Section 9(c)(5) derives from the House bill, where it was included as Section 9(f)(3).

The Limitation Upon the Board's Discretion Relative to the Appropriate Unit Was Disregarded in the Present Case.

It is Respondent's contention that in this case the Congressional limitation upon the Board's discretion was disregarded and a unit found to be appropriate in which the controlling factor was the extent to which the employees had organized. The Union filed a petition for a unit containing 3 employees at the same time when it was attempting to organize the other 97 in the same plant. The Union certainly knew of its own organizing efforts, the Respondent did not. The Board is charged with the duty of investigating any claim that a question of representation exists,² and its investigation should have revealed the above facts. A representation hearing is not an adversary proceeding but merely part of the Board's investigation.³ Why would a Union which takes as members all employees in a plant merely ask to represent 3, instead of 100, if it was not proceeding on the extent to which it had organized the employees. The Board, expert body that it is, cannot close its eyes to these facts. If the Union failed to disclose its efforts to organize all employees, that still does not excuse the Board from making a thorough investigation. If the Union follows its present procedure we can expect the filing of separate petitions for any other group which it happens to have organized, with a resultant disregard of the Congressional intent to prevent piece-meal organization of an employer such as Respondent, and added inconvenience, expense and duplication of effort by employer and Board.

²See Appendix.

³*Southern S. S. Co. v. NLRB*, 120 F. 2d 505.

The Exclusion of the Proffered Evidence Constitutes Prejudicial Error.

The General Counsel's objection that the excluded evidence proffered by Respondent was not material to the issue of the appropriate unit is not well taken. One of the factors which the Board considered in some of the cases decided prior to the adoption of Section 9(c)(5) in determining the appropriate unit was the Union's efforts to organize other employees of the same employer. (*Vickers, Inc.*, 60 N. L. R. B. 969; *Charles H. Bacon & Co.*, 53 N. L. R. B. 296.)

Since evidence of the Union's organizing efforts among employees other than cutters was not known to the Respondent at the time of the representation hearing the Respondent could not have introduced it at that time. The Trial Examiner did not specifically rule upon the fact that the evidence being excluded was newly discovered. His was a sweeping ruling which treated evidence which was known to the Respondent at the time of the representation hearing the same as the newly discovered evidence. In support of his ruling he cited several cases [R. 38] none of which is authority for the ruling that newly discovered evidence may not be considered under appropriate circumstances. In *Allis-Chalmers Mfg. v. N. L. R. B.*, 162 F. 2d 435, one of the cases so cited the court said in upholding the exclusion of certain testimony: "There was no claim that the testimony thus proposed to be introduced was newly discovered testimony not available or known to petitioner at the time of the representation hearing," and in *Pittsburgh Plate Glass Co. v. N. L. R. B.*, 313 U. S. 146, the following appears:

"With respect to item (3), the distinct interests of the Crystal City employees, the Board ruled that in

the unit proceeding the Company and the Crystal City Union were given full opportunity to present such evidence, *and in the present proceeding neither of them had indicated that the proof sought to be admitted related to evidence unavailable at, discovered since, or not introduced in, the unit hearing.*

* * * * *

“If the Company or the Crystal City Union desired to relitigate this issue, it was up to them to indicate in some way that the evidence they wished to offer was more than cumulative. *Nothing more appearing*, a single trial of the issue was enough.” (Emphasis added.)

Respondent did make the claim that the evidence was newly discovered. [R. 100, 102.]

The characterization of the proffer of such evidence as an attempt to relitigate an issue appears to be of questionable accuracy in view of the non-adversary character of representation proceedings.

The customary inquiry made by a court in considering whether newly discovered evidence should be received is whether the one offering it failed to exercise reasonable diligence in not presenting such evidence on an earlier occasion. The General Counsel did not contend that the Respondent had not exercised reasonable diligence in this regard, and the Trial Examiner did not base his ruling thereon, nor did he make any inquiry in regard thereto. The reason is obvious. Any questioning by Respondent of its employees concerning their organizing activities, or surveillance of such activities would be in violation of the Act. Diligence on Respondent's part in this regard would have only led to the filing of other charges of unfair labor practices. On the other hand the Union was

well aware of its organizing efforts among Respondent's employees, other than cutters and such efforts should have been uncovered by the Board in its investigation. As pointed out above such evidence is material to the determination of the appropriate unit, particularly in view of the noted limitation on the Board's discretion. The reason why such organizing efforts by the Union was not considered at the earlier hearing was due to the Union's failure to make disclosure of such facts and the Board's, not the Respondent's lack of diligence in discovering it.

In its decision the Board neither upheld nor overruled the Trial Examiner in his exclusion of the evidence relative to the organizing efforts of the Union. [R. 27-28.] It held that the exclusion, even if erroneous, was not prejudicial because its determination of the unit was supported by clear and decisive evidence wholly unrelated to extent of organization. That evidence it summarized in its decision in the representation case as follows:

"Upon the entire record herein, and particularly in view of the geographical separation of the 2 plants their different functions, the lack of employee interchange and bargaining history, and the fact that no labor organization currently seeks to represent employees at both plants, we find that a unit of employees limited to the San Fernando plant is appropriate." [R. 9.]

It is respectfully submitted that such findings when viewed against the background of the Union's organizing efforts among other than cutters at the San Fernando plant are wholly unrelated to the true and existing situation.

In view of the foregoing Respondent contends that it was prejudicial error for the Trial Examiner and the

Board to exclude the evidence described above. Such evidence was material to the issue of the appropriate unit under the Board's own decisions. The Respondent was not guilty of lack of diligence in discovering such evidence—the fault lying with the Union and the Board itself. The failure to consider such evidence results in a decision which is contrary to the provisions of the Act, and the exclusion thereof is a denial of due process to the Respondent.

Conclusion.

The Board has failed to show that the Respondent was guilty of a refusal to bargain within the meaning of the Act, or of any other violation of the Act, and it is therefore respectfully submitted that the petition for enforcement should be denied.

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